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No. 88-1543

Supreme Court, U.S.
FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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11 pp

QUESTION PRESENTED

Whether the court of appeals properly concluded that the Kentucky State Police Department failed to show that the mandatory retirement age of 55 for police officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is reported at 860 F.2d 665. The opinion of the district court (Pet. App. 10a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1988. A petition for rehearing was denied on January 13, 1989 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the Kentucky State Police Department, is responsible for enforcing state criminal and traffic laws. Under Kentucky law, Ky. Rev. Stat. Ann. § 16.505(15)

(Michie/Bobbs-Merrill 1985), all Kentucky State Police officers must retire at age 55. On August 29, 1984, the Equal Employment Opportunity Commission (EEOC) filed this action against petitioner under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*. The complaint alleged that petitioner's retirement rule violated Section 4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1). That Section makes it unlawful for an employer "to discharge any individual * * * because of such individual's age." Petitioner defended its retirement rule as a lawful "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of [its] particular business" (§ 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986)).

2. Following a trial, the district court concluded that petitioner's mandatory-retirement rule was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the ADEA (Pet. App. 16a). In evaluating petitioner's BFOQ defense, the court purported to apply the two-part test approved in *Western Air Lines, Inc.* v. *Criswell,* 472 U.S. 400, 414-416 (1985): that the employer show that (1) the job qualifications at issue—here, adequate aerobic capacity and the absence of heart disease—are reasonably necessary to its particular business, and (2) that "substantially all people over the mandatory retirement age cannot safely perform the duties of the job or that it would be highly impractical to deal with class members on an individual basis" (Pet. App. 11a). The district court noted that "[t]his is a close case," but found that "cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance" of an officer's job "[e]ven though * * * the Department here has no in-service fitness screening * * *" (*id.* at 11a-12a). Turning to the second part of the test, the court found that "there is a significant increase in coronary risk with age" and that

"non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age" (*id.* at 12a-13a). By contrast, the court found that the requisite aerobic capacity "can be accurately tested" on an individual basis (*id.* at 13a).

3. The court of appeals reversed (Pet. App. 2a-9a). It held that the district court's findings were clearly erroneous because the lower court did "not take into account the total and the crucial facts of this case" (*id.* at 3a). In particular, the court held that petitioner had not shown that the absence of heart disease was a necessary characteristic of a Kentucky state officer. Reviewing the record, the court of appeals found that petitioner "repeatedly permitted officers under the age of 55 who had known health problems including heart conditions to remain on the job with no diminution of duties" (*id.* at 4a-5a). And the court observed that petitioner "has no program for testing the fitness of its officers either as to aerobic or cardiovascular health" (*id.* at 4a). Accordingly, the court held that petitioner failed to show that the 55-year age limit is a BFOQ.

Judge Engel dissented because, in his view, this case "discloses no * * * lack of good faith by the Kentucky State Police" (Pet. App. 9a).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review is warranted.

1. In *Western Air Lines, Inc.* v. *Criswell, supra,* this Court adopted a two-part test that an employer must satisfy in order to justify its use of a mandatory retirement age (472 U.S. at 414-416). The employer must show: (1)

that a certain trait is a bona fide and reasonably necessary qualification for the position; and (2) that all or substantially all employees above the age limit lack the required qualification, or that it is impracticable for the employer to identify those who lack the required trait by individual testing.

Contrary to petitioner's assertion (Pet. 11), the court of appeals did not distort the first part of the *Criswell* test. The court simply held that petitioner failed to prove that the absence of heart disease is a necessary qualification for officers. That holding is well supported by the record. The former director of the Kentucky State Police testified that the initial selection of age 55 as the mandatory retirement age had nothing to do with health, fitness, or an officer's ability to do the job (EEOC C.A. Br. 22). The evidence also showed that petitioner permitted officers under age 55 who had known health problems, including heart disease, to remain on the job with no reduction in duties (Pet. App. 4a-5a). Moreover, petitioner allowed officers who had heart attacks and heart by-pass surgery to remain on the job (*id.* at 5a). One officer was retained even after he had three heart attacks (*ibid.*). Finally, petitioner made no effort to test the cardiovascular fitness of most of its officers (*id.* at 4a). Thus, by its own actions, petitioner has shown that the lack of heart disease in its officers is not "reasonably necessary to the normal operation of [its] business" (29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986)). Accordingly, the court of appeals' decision is consistent with *Criswell* and imposed no higher burden on petitioner than the plain language of the statute mandates.

Petitioner argues (Pet. 14-15) that the decision below will require it to establish an elaborate testing program to evaluate the fitness of officers. That is not correct. The court of appeals only held that a characteristic used to

justify mandatory retirement " 'must be a trait that the employer at least attempts to require of employees of all ages' " (Pet. App. 8a, quoting *EEOC* v. *Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987), cert. denied, No. 87-958 (Mar. 7, 1988)). The court did not impose any particular rules of testing on petitioner. And, in any event, petitioner's claim that a testing program would be unduly burdensome is belied by the record, which shows that petitioner gives regular physical fitness tests to its "special response teams" (Pet. App. 4a).

2. Petitioner further contends (Pet. 11-17) that the court of appeals' decision conflicts with *EEOC* v. *Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985), and *EEOC* v. *East Providence*, 798 F.2d 524 (1st Cir. 1986). In *Missouri State Highway Patrol*, which involved a challenge to the state's mandatory retirement age of 60 for police officers, the Eighth Circuit reviewed the routine duties of police officers and concluded that "[i]n light of these obligations and demands * * *, [the state] has clearly established that physical ability and ability to withstand stress are job qualifications which are reasonably necessary to the performance of [the jobs]" (748 F.2d at 451). To be sure, contrary to the court of appeals' decision here, the Eighth Circuit appears to have applied a less demanding level of scrutiny to an employer's asserted BFOQ defense. That decision, however, predates *Criswell*, where the Court made clear that the ADEA requires a more exacting standard than a "rationale basis in fact." See *Criswell*, 472 U.S. at 421; see also *EEOC* v. *Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987) ("Before a characteristic can be a reasonably necessary [qualification], it must be a trait that the employer at least attempts to require of employees of all ages."), cert. denied, No. 87-958 (Mar. 7, 1988). Accord-

ingly, any apparent tension between the court of appeals' decision and the *Missouri State Highway Patrol* opinion does not warrant this Court's review.

In *East Providence,* which also involved a challenge to a mandatory retirement age of 60 for police officers, the EEOC contended that the city failed to satisfy the first part of the *Criswell* standard because the city "does virtually nothing to ensure that members of the force below age 60 meet the physical fitness standards for which it seeks to use age 60 as a proxy" (798 F.2d at 528-529). The court of appeals rejected that argument because the district court had made a "particularized factual finding that physical strength and stamina and the ability to withstand stress are reasonably necessary to the operation of the police department" (*id.* at 529-530). In addition, the court of appeals observed that "[w]hile the existence of such [physical fitness] tests reinforced the argument that physical strength and stamina are a necessary requirement, it does not follow that physical abilities are proved to be unnecessary by the mere fact that a police department is slipshod in monitoring the health and fitness of its younger officers" (*id.* at 530).

The court of appeals in this case, however, did not rely solely on the absence of fitness tests for younger officers in support of its conclusion that petitioner had failed to establish that the lack of heart disease was a bona fide job qualification (Pet. App. 4a-5a). It also relied on the fact that younger officers who were known to lack the asserted qualification (*i.e.,* absence of heart disease) were allowed to continue working and that they performed competently. See also *EEOC* v. *Tennessee Wildlife Resources Agency,* 859 F.2d 24 (6th Cir. 1988) (employer that made exceptions to its mandatory retirement policy failed to establish BFOQ), cert. denied, No. 88-1100 (Mar. 6, 1989).

In any event, the issue presented by this case is of diminishing importance. In 1986, Congress amended the statute to permit state or local government employers to use mandatory-retirement rules for law-enforcement officers pending the results of a congressionally mandated study. That amendment, which became effective on January 1, 1987, and remains in effect through 1993, does not apply to actions such as this one, which were brought under the ADEA before the amendment's effective date. See Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 7(a) and (b), 100 Stat. 3344-3345, 29 U.S.C. 623 note (Supp. IV 1986). The amendment, however, confines the significance of the question presented here to those few actions for retrospective relief filed against state and local governments before January 1, 1987. Thus, any tension among the opinions of the courts of appeals does not call for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1989

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00217